

The opinion in support of the decision being entered today was not written for publication in a law journal and is not binding precedent of the Board.

Paper No. 20

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JEAN-LOUIS GUERET

Appeal No. 2003-1076
Application No. 09/779,873

ON BRIEF

Before KIMLIN, KRATZ, and POTEATE Administrative Patent Judges.
POTEATE Administrative Patent Judge.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134 from the final rejection of claims 1-46, which are all of the claims pending in the application.

Claims 1, 15 and 17 are representative of the subject matter on appeal and are reproduced below:

1. A device for applying a cosmetic product or a care product, the device comprising:

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a receptacle configured to be closed in a sealed manner and being suitable for containing a product; and

a porous structure for applying the product or for wiping an applicator, wherein the porous structure comprises at least one biocidal agent.

15. A method for conserving a porous structure for use with a cosmetic product or a care product, the method comprising:

incorporating at least one biocidal agent into the porous structure during manufacture of the porous structure; and

ensuring the porous structure does not completely dry out between two uses,

wherein the ensuring comprises enclosing the porous structure in a device configured to be at least substantially sealable.

17. A method of manufacturing a porous structure for applying a cosmetic product or a care product, the method comprising:

incorporating at least one biocidal agent into the porous structure,

wherein the at least one biocidal agent is at least partially hydrosoluble such that the at least one biocidal agent is in a solid or a concentrated state when the porous structure is dry.

The references relied upon by the examiner are:

Kellett	4,806,572	Feb. 21, 1989
Battice et al. (Battice)	4,631,297	Dec. 23, 1986
Gettings et al.	5,013,459	May 7, 1991

GROUND OF REJECTION

Claims 1-46 stand rejected under 35 U.S.C. § 103 as unpatentable over appellant's admission of prior art at page 1, lines 15-19 of the specification in view of Kellett, Battice and Gettings.

We affirm.

BACKGROUND

The invention relates to a device for applying a cosmetic product or a care product. The device includes a receptacle configured to be closed in a sealed manner, the receptacle being suitable for containing both a product and a porous structure. Appeal Brief, paper number 15, received October 28, 2002, page 2. A porous structure may be used for either applying the product or for wiping an applicator, and includes at least one biocidal agent. Id.

When a porous structure is dry, the biocidal agent is present in a solid or concentrated state. Specification, page 1, lines 23-25. Because the receptacle may be closed in a sealed manner, however, the porous structure is able to retain residual moisture when in use as an applicator or for wiping an

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applicator. Id., lines 26-30. According to appellant, use of the biocidal agent avoids the necessity of including preservatives in the product, which is particularly important when the product is a care product, used for sensitive areas, such as the face. Id., lines 12-14.

DISCUSSION

Appellant separately groups the claims as follows:

- I. Claims 1-14 and 18-46;
- II. Claims 15-16; and
- III. Claim

GROUP I

Appellant essentially argues that the examiner has failed to establish a prima facie case of obviousness, because secondary references are non-analogous art, the examiner has failed to establish motivation to combine the references, and one of ordinary skill in the art would not have had a reasonable expectation of success in achieving the claimed invention if the references were combined. See Appeal Brief, pages 8-9.

According to the examiner, the admitted prior art teaches cosmetic or skin care packaging and applicator devices, which include porous applicators or porous structures for wiping applicators. Appeal Brief, page 8 (citing Office action, paper

number 6, mailed January 3, 2002, page 5). The examiner also takes "official notice" that these types of devices also include a reservoir for holding a product and a removable closure means for sealing the package when not in use. Id. The examiner concedes that the admitted prior art fails to disclose "incorporation of a biocide into the porous structure." Id. The examiner relies on Kellett, Battice and Gettings as disclosing integration of a microbial compound into foam products. Id. The examiner maintains it would have been obvious to have included a biocide in the porous applicators or structures of the prior art packages given the teachings of Kellett, Battice and Gettings of incorporating an antimicrobial biocide into applicators and wipes. Examiner's Answer, paper number 16, mailed November 13, 2002, page 4.

Appellant argues that Kellett is directed to makeup remover pads and, therefore, is not in the field of methods and devices for applying cosmetic and/or care products. Id., page 9. Moreover, Kellett is concerned with a different problem than that with which appellant was concerned, namely, controlling the release of liquid onto the skin, whereas appellant is concerned with problems associated with multiple use devices for applying cosmetic and/or care products (e.g. problem addressing potential

issues relating to excessive preservatives in cosmetic and/or care products). Id., pages 10-12.

In making a patentability determination, analysis must be given to the question, "what is the invention *claimed*?" since "[c]laim interpretation, . . . will normally control the remainder of the decisional process." Panduit Corp. v. Dennison Mfg. Co., 810 F.2d 1561, 1567- 68, 1 USPQ2d 1593,1597 (Fed. Cir.), cert. denied, 481 U.S. 1052 (1987). As pointed out by the examiner, the invention claimed is not limited to a device for applying cosmetics, rather claim 1 recites a device for applying a cosmetic product or a care product. See Examiner's Answer, page 5. Thus, we are in agreement with the Examiner that this language reads on Kellett's teaching of a porous pad used to apply makeup remover, i.e., a care product, to the skin. See Examiner's Answer, page 6. Further, we are in agreement with the examiner that one of ordinary skill in the art seeking to improve known packaging and applicator devices that use a porous structure, would have been motivated to have looked to Kellett, which is directed to a ready to use foam pad in attempting to reduce the quantity of preservative required in such device. See Kellett, column 7, lines 19-23 ("Minor but effective amounts of chemically-compatible antimicrobial agents may also be included

in the present aqueous phases to reduce or eliminate the bioburden of the foam pads during storage and following exposure to air.”)

We further note that Kellett appears to anticipate claim 1. As noted above, Kellett teaches ready to use moist foam pads for applying makeup remover, i.e., a device for applying a care product. See Kellett, column 8, line 20. The moist foam pads are enclosed in moisture and vapor-impermeable packaged. Id. at lines 22-23. Thus, Kellett teaches a receptacle configure to be closed in a sealed manner and suitable for containing a product and a porous structure for applying the product. See claim 1. Moreover, as already noted above, the foam pads may contain an antimicrobial agent. See In re Baxter Travenol Labs, 952 F.2d 388, 391, 21 USPQ2d 1281, 1285 (Fed. Cir. 1991) (claims which are anticipated are also necessarily obvious).

Accordingly, we affirm the rejection as to claims 1-14 and 18-46.

GROUP II

Appellant argues that Gettings is non-analogous art, because it relates to a device for dispensing ophthalmic saline solution which is unlike appellant's claimed invention. Appeal Brief, page 14. According to appellant, in Gettings' device, the porous

filter medium does not apply the saline solution nor wipe an applicator for applying a cosmetic and/or care product. Appeal Brief, page 14. In addition, appellant notes that Gettings is concerned with the problem of antimicrobial compound being deleted from the porous filter medium, which is not the same problem with which appellants is concerned. Id., page 15.

As explained above, the relevant inquiry is, "what is the invention claimed?" Claim 15 does not include any language requiring that the device be used for "application" of a cosmetic product or care product or that the porous structure is suitable for wiping an applicator. Rather, their method relates to a method for conserving a porous structure for use with a cosmetic product or care product. Gettings teaches constructing a porous filter medium with a bound antimicrobial. See column 5, line 60-column 6, line 12. The porous structure is contained in a container having exterior threads which meet with the interior threads of the container cap, such that the container is at least substantially sealable. The container is designed to hold a liquid, i.e., saline solution. Gettings mentions that particular areas of application from antimicrobial agents and compositions are in the area of cosmetics and disinfectants. Column 1, lines 38-40. Gettings' invention is directed toward providing an

ophthalmic fluid, such as a saline solution, which is free of preservatives. Id., column 5, lines 23-25. Accordingly, we are in agreement with the examiner that one of ordinary skill in the art would have been motivated to have looked to Gettings in seeking to improve known packaging and applicator devices that use a porous structure for application purposes or for wiping an applicator.

Moreover, as with Kellett, Gettings appears to anticipate the invention as claimed in claim 15. Accordingly, the rejection of claims 15 and 16 is affirmed.

GROUP III

Claim 17 relates to a method of manufacturing a porous structure for applying a cosmetic product or a care product. The method comprises incorporating a biocidal agent into the porous structure, the biocidal agent being at least partially hydrosoluble such that it is in a solid or a concentrated state when the porous structure is dry. Battice discloses an anti-microbially effective organic foam and method for preparation thereof. Battice discloses that the foams are useful in applications which include sponges (column 5, line 67-column 6, line 9), i.e., a porous structure which may be used to apply a cosmetic product or a care products. The disclosed foams are

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also useful in applications such as backings for carpets, furniture, etc., i.e., applications in which the biocidal agent is in a solid state when the structure is dry. See column 5, lines 67-68. Accordingly, we are in agreement with the examiner that one of ordinary skill in the art at the time of the invention would have been motivated to have looked to Battice in seeking to improve packaging and applicator devices that use a porous structure for application purposes.

The rejection of claim 17 is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

AFFIRMED

EDWARD C. KIMLIN)	
Administrative Patent Judge)	
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PETER F. KRATZ)	BOARD OF PATENT
Administrative Patent Judge)	APPEALS AND
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